

Sime Bank Bhd v Mohd Hassan bin Sulaiman**A**

HIGH COURT (KOTA BHARU) — ORIGINATING SUMMONS NO MT(3)
24-67 OF 1999
SURIYADI J
4 JANUARY 2000

Land Law — Charge — Order for sale — Application for — Charge unregistered and charge documents unstamped — Chargor agreed to be jointly and severally liable for loan in charge annexure — Whether bank could foreclose land — Whether bank could rely on contractual agreement to foreclose land — Rules of the High Court 1980 O 83

B

The plaintiff granted one Wan Ismail bin Hj Ibrahim, the borrower, a temporary overdraft facility of RM125,000 which was to be secured by a charge over the defendant's land. By the charge annexure, the defendant had also agreed to be jointly and severally liable for the loan. When the borrower defaulted on the facility agreement, the plaintiff initiated legal action to recover the outstanding amount. The plaintiff sought to foreclose the land by following the procedures under O 83 r 1(1)(b) of the Rules of the High Court 1980 and chose the National Land Code 1965 ('NLC') as its vehicle of recovery. The facts of the case revealed, amongst others, that the charge was not registered, the charge documents were not stamped and that the details for the witness to the signature was not completed. The issues were: (i) whether charge was capable of being enforced even though the charge was not registered; and (ii) if it could not, whether the plaintiff could resort to the parties' contractual obligations subject to the procedures provided for under the NLC.

C**D****E**

Held, dismissing the application with costs:

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- (1) The land in this case cannot be foreclosed pursuant to the NLC as the charge had not been registered. Section 5 of the NLC provides that a 'charge' in the context of the NLC was a registered charge (see p 162E-F).
- (2) The parties had agreed, through the charge annexure, to be bound by the details of the sale as set out under the NLC and that a notice must be served on the defendant before a notice under s 254 was served. On the facts, no statutory notice was served on the defendant and as such no cause of action arose against the defendant (see p 163B-D, F).

G**H****[Bahasa Malaysia summary]**

Plaintif telah memberikan seorang bernama Wan Ismail bin Hj Ibrahim, peminjam, satu kemudahan overdraf sementara sebanyak RM125,000 yang akan dijamin oleh satu gadaian ke atas tanah defendan. Melalui lampiran gadaian tersebut, defendan juga telah bersetuju untuk bertanggungjawab secara bersesama dan berasingan ke atas pinjaman tersebut. Apabila peminjam tersebut telah gagal

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- A dalam perjanjian kemudahan tersebut, plaintif telah memulakan tindakan undang-undang untuk memdapat kembali baki jumlah tersebut. Plaintif telah memohon agar tanah tersebut dihalangtebus dengan mematuhi prosedur-prosedur di bawah A 83 k 1(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 dan memilih Kanun Tanah Negara ('KTN') sebagai alat untuk mendapatkan kembali baki jumlah tersebut. Fakta-fakta kes mendedahkan, antara lain, bahawa gadaian tersebut tidak didaftarkan, dokumen-dokumen gadaian tersebut tidak dimatisetamkan dan bahawa butiran untuk saksi kepada tandatangan tidak lengkap. Isu-isu adalah: (i) sama ada gadaian tersebut dapat dikuatkuasakan walaupun gadaian tersebut tidak didaftarkan; dan
- B (ii) jika tidak boleh, sama ada plaintif boleh mengambil jalan keluar dengan bergantung kepada kewajipan kontraktual pihak-pihak tersebut tertakluk kepada prosedur-prosedur yang diperuntukkan di bawah KTN.

Diputuskan, menolak permohonan tersebut dengan kos:

- D (1) Tanah yang disebutkan di dalam kes ini tidak boleh dihalang tebus menurut KTN kerana gadaian tersebut tidak didaftarkan. Seksyen 5 KTN memperuntukkan bahawa satu 'gadaian' di dalam konteks KTN adalah merupakan satu gadaian berdaftar (lihat ms 162E-F).
- E (2) Kedua-dua pihak telah bersetuju, melalui lampiran gadaian tersebut, akan terikat dengan butiran jualan sebagai mana yang telah dinyatakan di bawah KTN dan bahawa satu notis sepatutnya diserahkan ke atas defendan sebelum satu notis di bawah s 254 diserahkan. Berdasarkan fakta-fakta berikut, tiada notis statutori telah diserahkan ke atas defendan dan oleh
- F demikian tiada kausa tindakan yang timbul terhadap defendan (lihat ms 163B-D, F).]

Notes

- G For cases on order for sale generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1660-1712.

Cases referred to

- H *Central Malaysian Finance Bhd v Loke Kok Lai* [1975] 1 MLJ 160 (refd)
Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd [1992] 2 MLJ 650 (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
Mastiara Sdn Bhd v Motorcycle Industries (M) Sdn Bhd & Ors [1999] 1 AMR 362 (refd)
- I *Multi-Purpose Bank Bhd v Maimoon bte Abdul Razak* [1999] 6 MLJ 215 (refd)
Overseas Union Bank Ltd v Chuah Ah Sai [1989] 3 MLJ 503 (refd)

United Malayan Banking Corp Bhd v Chong Bun Sun & another application [1994] 2 MLJ 221 (refd) **A**

Legislation referred to

National Land Code 1965 ss 5, 206, 241, 254, 256(3), 292, 294, 295, 301 **B**

National Land Code (Penang and Malacca Titles) 1963

Rules of the High Court 1980 O 83 r 1 (1)(b)

Stamp Act 1949 ss 51, 52

Ting Hun Yin (Lua & Mansor) for the plaintiff.

Aminuddin bin Muhammad (Mahmood Adam & Co) for the defendant. **C**

Cur Adv Vult

Suriyadi J: According to the available evidence, the plaintiff had granted one Wan Ismail bin Hj Ibrahim ('the borrower'), a temporary overdraft facility of RM125,000.00, together with interest at the rate of 14% pa. In support of that facility, the defendant on 17 January 1984 charged his property, identified as Lot 1572 Geran No 15325 Mukim Dewan, Jajahan Machang, Kelantan ('the land'), as security. That all important security has been exhibited as MYO-1. The plaintiff further alleged that the defendant, pursuant to that document had agreed to be jointly and severally liable for the loan. The borrower later reneged on the facility agreement, resulting in the plaintiff initiating a legal action to recover the unpaid sum of RM528,419.52, as confirmed by the demand letter of 12 November 1998. As the defendant was supposed to have been a party to the contractual set-up, one was also sent to the defendant. As it were, both ignored the demand letters. To satisfy the debt, the plaintiff not surprisingly took the immediate easy step of calling up the charge, which for some unexplained reason was never registered with the land office. Whether it was due to negligence or deliberate act is not for my consideration. **D**

The application to foreclose the land as initiated by the plaintiff is pursuant to the procedures laid down under O 83 r 1 (1)(b) of the Rules of the High Court 1980. It is trite law that this provision merely stipulates the procedural rules which the parties need to comply with. As far as that technical matter is concerned I am satisfied nothing is wanting (*United Malayan Banking Corp Bhd v Chong Bun Sun & another application* [1994] 2 MLJ 221). In spite of the charge being left unregistered as mentioned above, and instead of proceeding by some other mode of action, the plaintiff still chose the strict National Land Code 1965 ('NLC') as its vehicle of recovery. In the final analysis, two legal question were left for my consideration, viz: **E**

- (i) whether the relevant charge which was not registered with the land office, capable of being foreclosed under the NLC; and **F**
- (ii) if not, could the plaintiff then resort to the parties' contractual obligation but subject to the procedures provided for under the NLC? **G**

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A To answer the above questions, it is perhaps necessary for me to comprehend the prevailing land system in Peninsular Malaysia, with particular emphasis on charges. The NLC, was made effective from 1 January 1966 whereby thenceforth a uniform system of land tenure and dealing existed throughout Peninsular Malaysia. Penang and Malacca were also absorbed into the system by the promulgation of the National Land Code (Penang and Malacca Titles) 1963, effective also on 1 January 1966.

B In a gist, the system practiced is commonly referred as the Torrens System, or the registration of title system. It owed its origin or name after Sir Robert Torrens, who earlier had introduced it into South Australia which thereafter spread throughout Australia, and eventually reaching our shores.

C The charging of a piece of alienated land under the NLC, for the repayment of any debt, or the payment of any sum other than a debt, or the payment of any annuity, or other periodic sum is permitted by s 241 of the NLC. Part Eighteen lays down matters pertaining to the registration of dealings which includes 'any charge' (s 292). The latter may be defined as a transaction whereby the proprietor of alienated land or of a lease of alienated land pledges it as security for repayment of a loan or payment of an annuity or other periodical payment (see *Judith Sihombing's National Land Code*). That charge to be effective for purposes of the NLC must be effected by an instrument in Form 16A and be registered (s 206). This pertinent provision reads:

- E** Need for proper instrument of dealing, duly registered
- (1) Subject to the following provisions of this section —
- (a) *every dealing* under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and
- (b) *no instrument effecting any such dealing shall operate* to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, *until it has been registered* under Part Eighteen. (Emphasis added)
- F**

To qualify for registration, that charge must be subordinated to the strict requirements of s 301, inter alia, the prescribed registration fee having been paid and the statutory stamp duty duly met. This is so as s 294 in stark terms clearly provides:

- G**
- (1) Every instrument presented for registration under this Part —
- (a) shall consist of a single original duly stamped in accordance with the provisions of the Stamp Ordinance 1949, and
- (b) where it is a ... charge, shall, ... be accompanied by a duplicate thereof, plainly marked as a true copy ... and duly stamped.
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Whether the relevant documents are chargeable under the Stamp Act 1949, will depend on the Collector. Under s 51 of the Stamp Act 1949 any document not duly stamped may also be impounded by the land office, and passed to the collector of stamp duties. This section reads:

- I** Every person having by law or consent of the parties authority to receive evidence, and every person in charge of a public office ... before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the

performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

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Pursuant to the Stamp Act 1949, unless the documents have been duly stamped, such documents evidence-wise, are inadmissible in court (s 52). In fact the litigant might even be exposed to prosecution and liable to a fine not exceeding RM1,500 for executing and signing such a document. Under item 27 of the First Schedule (s 4) of the Stamp Act, an original charge document clearly attracts ad valorem duty, ie duty proportionate to the value of the property on which the instrument is based, or fixed in amount. It is only thereafter that the registered charge is entered into the presentation book, maintained by the registrar (s 295 NLC).

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I now would like to resolve *the first question*. This entails a comprehensive perusal of MYO-1 ie the current charge. A scrutiny of Form 16A led me to these factual findings:

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- (a) the contentious document before me is unstamped;
- (b) the portion for the witness at p 3 had been left unfilled;
- (c) certain facts, in the like of who Anuar bin Jusoh is, has been left hanging;
- (d) the annexure, in particular the space next to para (vii), did not indicate the signature of the defendant, thus giving credence to his assertion that he was unaware of the amendment; and
- (e) openly agreed by the plaintiff that the charge was never registered pursuant to the NLC.

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After due consideration of all the factors, it is my finding that the relevant land in this case, cannot be foreclosed pursuant to the NLC, as the minimum requirement ie the registration factor, had not been complied with. It flies against s 5, which in crystal clear terms provides that a 'charge', in the context of the NLC, means a registered charge. The admission of the plaintiff merely made the defence and court's work easier. This is in spite of the fact that the burden is on the defence to show cause to the contrary as provided for under s 256(3) of the NLC (*Overseas Union Bank Ltd v Chuah Ah Sai* [1989] 3 MLJ 503). On that premise, with the work of the defendant simplified, there is thus no necessity for me to touch on the other provisions (*Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650).

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I now touch on *the second question*, which mainly revolves around the annexure. My research so far has not been successful in identifying any provision that prevents such a course of action. In fact, the insertion of s 206(3) in the NLC merely confirms my view that parties' contractual wishes are not impeded in anyway by the rules of the NLC (see *Mastiara Sdn Bhd v Motorcycle Industries (M) Sdn Bhd & Ors* [1999] 1 AMR 362 for comparison). But if they desire to do so then they must accordingly also be bound by its stringency. That being the situation, some scrutinizing of the contents of the contract is necessary. Apart from appreciating its contents, which will invariably reflect the essence of the outcome of the meeting of the

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- A parties' minds, the normal rules of evidence must not be sacrificed. On that score, if such a course of action is anticipated, and the documentation is found to be wanting, as in this case no duty was paid, the court action must eventually be short-lived too. On that premise, even though it will be quite safe for me to debunk this action at its infancy due to MYO-1's inadmissibility, in the circumstances of the case it is quite appropriate for me to briefly highlight another weakness as well.

- B At the outset I must state that, after a comprehensive scrutiny of the annexure, I am satisfied that parties did agree to be bound by the details of the sale as set out under the NLC. Paragraph (x) read together with para (xi), which are highly relevant for purposes of this discussion, have laid down the ground rules in the event of any foreseeable breach of the agreement. Pursuant to these two paragraphs, the plaintiff must first of all serve a notice to the defendant, three months prior to a follow up notice within the meaning of s 254 of the NLC. As it is in this case, even if the first notice were served on the defendant, no Form 16D notice was ever served on the defendant. It must be borne in mind that, for purposes of this alternative mode of action, even though the NLC does not require the serving of the earlier notice (MYO-4), as parties had agreed to abide by it, then adherence is required (distinguishable with *Multi-Purpose Bank Bhd v Maimoon bte Abdul Razak* [1999] 6 MLJ 215). The service of Form 16D is a must, as, to reiterate my finding of fact, parties prior to the inception of the facility had agreed to be bound by the NLC stringent rules (see *Central Malaysian Finance Bhd v Loke Kok Lai* [1975] 1 MLJ 160). It is universally accepted that lending institutions generally have the upper hand prior to the sealing of an agreement between consenting parties. It is thus unacceptable now if the plaintiff is heard to complain that it cannot and will not adhere to the provisions of the agreement, merely because it is at the wrong end of the stick. It has itself to blame for the lackadaisical attitude portrayed since 17 January 1985. It had 14 long years to overcome that potentially disastrous consequence, but that was not to be. The repercussion of the administrative oversight was that it resulted in substantive evidential and procedural defect. That being so, there was thus no cause of action that could be undertaken against the defendant.

- G Founded on all those grounds, I have no compunction in dismissing this case with costs.

Dismissing the application with costs.

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Reported by Chin En Tek

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